Supreme Court, U.S.
FILED
DEC 9 1985
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(2)

No. 85-411

In the Supreme Court of the United States

OCTOBER TERM, 1985

VIVITAR CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the validity of 19 C.F.R. 133.21.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is reported at 761 F.2d 1552. The opinion of the Court of International Trade (Pet. App. 103a-170a) is reported at 593 F. Supp. 420.

JURISDICTION

The judgment of the court of appeals was issued on May 6, 1985. A petition for rehearing was denied on June 12, 1985 (Pet. App. 101a-102a). The petition for a writ of certiorari was filed on September 10, 1985. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a California corporation, owns the "VIVITAR" trademark for certain types of photographic equipment (Pet. App. 11a-12a). Petitioner's products are manufactured according to its specifications by foreign manufacturers, which affix the VIVITAR trademark to the goods at petitioner's direction (*id.* at 12a-13a). Petitioner then consents to the importation of the finished products into the United States, and markets the products domestically through authorized dealers (*id.* at 14a). These products, which carry the authorized VIVITAR trademark, are marketed overseas by petitioner's wholly-owned subsidiaries; these subsidiaries evidently are not authorized to sell the goods in the United States (*id.* at 107a, 117a-118a).

1. Goods bearing the VIVITAR trademark also are brought into the American market by independent importers. Because there is a substantial price differential between VIVITAR products sold domestically by petitioner's authorized dealers and the same products sold overseas by petitioner's foreign subsidiaries, these importers are able to purchase the products overseas,[1] bring them into the United States, and sell them profitably through discount outlets (Pet. App. 14a, 107a-108a). Products brought into the United States in this manner—which generally are termed "grey market" goods or "parallel importations" (see *id.* at 5a)—bear a genuine VIVITAR trademark (see *id.* at 6a), although petitioner

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[1] The record does not reflect whether the VIVITAR products are purchased overseas directly from petitioner's subsidiaries (see Pet. App. 14a).

has not consented to their importation (see *id.* at 108a).

2. In response to the domestic distribution of these grey market goods, petitioner brought suit in the United States Court of International Trade, seeking to require the Customs Service (Customs) to exclude products bearing the VIVITAR trademark unless petitioner specifically consents to their importation (see Pet. App. 7a). Petitioner relied on 19 U.S.C. 1526(a), which provides in relevant part that "it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise * * * bears a trademark owned by a * * * corporation * * * organized within[] the United States * * * unless written consent of the owner of such trademark is produced at the time of making entry."[2] Petitioner thus sought to enjoin, as inconsistent with the statute, the enforcement of a Customs regulation (19 C.F.R. 133.21) that subjects foreign-made goods to seizure and forfeiture when those goods bear a trademark owned by a United States corporation—but that exempts imported goods from this restriction when the foreign and United States trademarks are owned by the same entity (19 C.F.R. 133.21(c)(1)), when the trademark owners are parent and subsidiary companies or are subject to common ownership (19 C.F.R. 133.21(c)(2)), or when the trademark borne by the article in question was applied with the authorization of the United States trademark owner

[2] Section 1526(b) provides that products imported into the United States in violation of Section 1526(a) "shall be subject to seizure and forfeiture." In addition, Section 1526(c) provides the domestic trademark holder with an action for damages and profits against the importer.

(19 C.F.R. 133.21(c)(3)). Pursuant to this regulation, Customs does not prohibit the importation of grey market goods.

The Court of International Trade upheld the validity of the regulation.[3] The court acknowledged that the literal language of Section 1526 could be read to support petitioner's claim that all foreign-made goods bearing a United States trademark must be excluded absent the trademark owner's consent (Pet. App. 122a). But an extensive review of the legislative background and history (see *id.* at 124a-136a) convinced the court that Section 1526 was enacted as a response to the court of appeals' decision in *A. Bourjois & Co.* v. *Katzel*, 275 F. 539 (2d Cir. 1921), rev'd, 260 U.S. 689 (1923). That decision had denied a United States company the right to exclude trademarked foreign goods even though the comany had purchased exclusive domestic rights to use of the trademark from the foreign manufacturer of the goods; the Court of International Trade accordingly held that the statute was intended only to "protect[] the property rights of American citizens who have purchased trade-marks from foreigners * * * when these foreigners deliberately violate the property rights of those to whom they have sold these trade-marks by shipping over to this country goods under those identical trademarks.'" Pet. App. 129a, quoting 62 Cong. Rec. 11603 (1922) (remarks of Sen. Sutherland). See Pet. App. 160a-161a.

The Court of International Trade found this reading of Section 1526 supported by longstanding ad-

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[3] The court first rejected Customs' argument that it lacked jurisdiction to hear the case. 585 F. Supp. 1419 (1984).

ministrative interpretation. From 1936 to the present, the court explained, Customs has "den[ied] American trademark owners the right to exclude goods manufactured abroad bearing their trademarks, when control of the foreign trademark is in the hands of the American trademark owner" (Pet. App. 152a-153a; see *id.* at 136a-153a). The court also noted that Congress, although plainly aware of Customs' regulatory approach (see *id.* at 153a-154a), has declined to disturb that approach, while it has modified Section 1526 in other ways (Pet. App. 155a-156a; see *id.* at 158a-159a). And the court explained that industry has long relied on Customs' regulatory approach (*id.* at 169a-170). It therefore held that "Customs' interpretation is a reasonable construction reflecting Congress' intent, and in fact is a necessary construction of the statute to avoid results Congress clearly did not intend" (*id.* at 159a).

3. The court of appeals affirmed, although on different grounds.[4] The court reasoned that an intent to reverse the court of appeals' *Katzel* decision was not the sole motivation for the enactment of Section 1526 (Pet. App. 39a), explaining that the congres-

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[4] The court of appeals also held that the Court of International Trade had exclusive jurisdiction to resolve petitioner's action for an injunction under 28 U.S.C. 1581(i)(3) and (4), which grant the latter court jurisdiction over suits against the United States relating to "embargoes or other quantitative restrictions on the importation of merchandise." Pet. App. 19a-35a. This aspect of the holding below is not presented by the petition for a writ of certiorari, although the Court will be required to address it if certiorari is granted. The court of appeals also held that "[t]he determinations of the respective rights between private parties under 19 U.S.C. § 1526(c) * * * fall within the jurisdiction of the federal district courts" (Pet. App. 32a).

sional debate was "too unfocused and misinformed to serve as a definitive basis for interpretation of § 1526" (Pet. App. 50a). The court also found that Customs' interpretation of Section 1526 has not been consistent (Pet. App. 62a-75a), because "[t]he [Customs] regulations, while imposing the 'same entity' limitation since 1936, have not been consistent in respect of what other limitations should be recognized nor has consistency been unequivocally shown in enforcement" (*id.* at 75a). And the court found that Congress has not ratified Customs' current approach, noting that Congress has not affirmatively endorsed 19 C.F.R. 133.21 (Pet. App. 76a-77a).

Despite these conclusions, however, the court of appeals upheld the challenged regulation. As the court read Section 1526(a), the statute does not require Customs "to exclude all grey market goods *sua sponte*" (Pet. App. 83a). Instead, the court acknowledged that the statute may have some implied limitations (see *id.* at 85a). And the court noted that trademark owners may pursue a private remedy against the improper importation of trademarked goods pursuant to Section 1526(c) (Pet. App. 86a-87a). The court therefore held that the challenged regulation does "no more than define Customs' role in initiating administrative enforcement of the statute" (*id.* at 83a). Additional protection would be available to petitioner by "pursu[ing] a determination of its alleged rights against persons engaging in parallel importation of VIVITAR photographic equipment in federal district court" (*id.* at 89a).

Judge Davis concurred in the result (Pet. App. 97a-99a). He found that Customs' administration of Section 1526 has been "substantially consistent" since 1936 (Pet. App. 98a), and he reasoned that the

challenged regulation is valid because "Customs could properly, for its own administrative and enforcement purposes, provide that it would exclude less than all the trademarked goods that *might* turn out to be covered by § 1526" (*ibid.* (emphasis in original)). But Judge Davis took the court to task for expressing "lengthy dicta" on the question whether Section 1526 does in fact reach farther than does 19 C.F.R. 133.21 in suits between private parties. He noted that the Court of International Trade never will deal with such private party suits, and that the Federal Circuit may do so only when the trademark claims are joined with an appealed patent claim (Pet. App. 99a). Judge Davis therefore labeled the court of appeals' remarks on the reach of Section 1526 "needless and gratuitous" comments that "will not bind any court" (Pet. App. 99a).

ARGUMENT

In our view, the court of appeals, like the Court of International Trade, should have grounded its holding on Customs' reading of 19 U.S.C. 1526 and on the agency's longstanding interpretation of that statute. Because the court of appeals correctly decided to uphold the validity of 19 C.F.R. 133.21, however, further review of its decision is unnecessary. Indeed, review of the scope of Section 1526 should await further litigation in the circuits and the development of a clearer factual record.

1. a. In 1921, the Second Circuit issued its decision in *A. Bourjois & Co.* v. *Katzel*, 275 F. 539, rev'd, 260 U.S. 689 (1923). That case involved a United States company (Bourjois) that had purchased exclusive domestic rights to use of a trademark from a French company. Despite this transaction, the French producer sold its trademarked product to a competitor of Bourjois, who in turn marketed the

product in the United States in its original French packaging. Bourjois brought suit under Section 27 of the Trademark Act of 1905, ch. 592, 33 Stat. 730, claiming that these sales violated its trademark rights. The court of appeals rejected this claim, holding that importation of goods bearing a genuine trademark cannot violate the trademark laws. 275 F. at 541.

The predecessor to 19 U.S.C. 1526 (Tariff Act of 1922, ch. 356, § 526, 42 Stat. 975) was enacted in 1922 for the express purpose of overturning the Second Circuit's *Katzel* decision.[5] See H.R. Rep. 1223, 67th Cong., 2d Sess. 158 (1922). The statute "was intended only to supply the casus omissus, supposed to exist in section 27 of the Act of 1905 * * * because of the decision of the Circuit Court of Appeals in *Bourjois* v. *Katzel.*" *Coty, Inc.* v. *Le Blume Import Co.*, 292 F. 264, 269 (S.D.N.Y.) (Hand, J.), aff'd 293 F. 344 (2d Cir. 1923).

Thus, as the Court of International Trade explained, "the sponsors [of the statute] made clear that the purpose of the amendment was to protect an American trademark owner who had purchased the right to use a trademark in America from an independent foreign company" (Pet. App. 130a). Senator McCumber's remarks are illustrative: he noted that under *Katzel* "the American purchasers of these [trademark] rights are entirely unprotected," and that the statute would address this problem by "protect[ing] the American purchaser." 62 Cong. Rec.

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[5] The statute was enacted prior to this Court's 1923 reversal of the court of appeals' *Katzel* ruling. 260 U.S. at 689. This Court's decision relied on the law governing assignment of trademark rights and made no mention of the recently-enacted statute. See *id.* at 691.

11604 (1922). Senator Sutherland agreed that the statute's "only aim is to prevent, a palpable fraud" by "protect[ing only] a property right which has been sold." *Id.* at 11603. While the court below believed otherwise (ee Pet. App. 50a), an examination of the legislative debate indicates that every comment in favor of the legislation expressed a similar view of its scope.[6] See 62 Cong. Rec. 11604 (1922) (remarks of Sen. Sutherland); *ibid.* (remarks of Sen. Pomerene); *ibid.* (remarks of Sen. McCumber); *id.* at 11605 (colloquy between Sen. Lenroot and Sen. McCumber).[7]

b. As Judge Davis recognized (Pet. App. 98a), Customs consistently has interpreted Section 1526 as reaching only the circumstances presented in *Katzel.* Thus, regulations issued in 1936 provided that the holder of a domestic trademark generally could challenge the importation of goods bearing that trade-

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[6] The sponsors also made clear that they did not intend the statute to permit a foreign producer to "monopolize" trade in a trademarked good by having an agent obtain trademark rights in the United States, who would then refuse to consent to the importation of trademarked goods obtained overseas from its principal. See 62 Cong. Rec. 11603 (1922) (remarks of Sen. Sutherland); *id.* at 11605 (remarks of Sen. McCumber). This is precisely the reading of the statute that petitioner is contending for, however. See Pet. App. 161a-164a.

[7] Section 526 of the Tariff Act of 1922 was reenacted without change as Section 526 of the Tariff Act of 1930, ch. 497, 46 Stat. 741. At the time, Congress reaffirmed its understanding of the scope of the provision. See 71 Cong. Rec. 3873 (1929) (remarks of Sen. Reed) ("the purpose of [Section 526] is to protect the American owner of the trade-mark against importations of articles which have been stamped with his mark without his consent").

mark—but that it could not do so when the United States and foreign trademark were "owned by the same person, partnership, association, or corporation." T.D. 48,537 (reprinted at C.A. App. 198-199). See T.D. 51,779 (1947). The regulation was amended in 1953 to make clear that this exception applied when the United States and foreign trademarks were owned by "related companies." T.D. 53,399 (reprinted at C.A. App. 210).[8] While this express provision for related companies was eliminated in 1959 (T.D. 54,932) (reprinted at C.A. App. 215), that change evidently did not reflect any modification in Customs policy; it remained Customs' clear position that importation was permissible when the domestic and foreign trademarks were owned by parent and subsidiary corporations. See Letter from D.H. Flinn to Walter A. Slowinski (July 2, 1962) (C.A. App. 150);[9] Letter from D.H. Flinn to Selig J. Levitan (Mar. 15, 1963) (C.A. App. 151); Letter from Paul K. McCarthy to Peter Gray (Dec. 11, 1968) (C.A. App. 124); T.D. 69-12(2) (1969). This position is

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[8] This amendment simply made explicit what already was Customs' policy. See Letter from Frank Dow to Senator Paul Douglas (Mar. 23, 1951) (C.A. App. 145-149) (exception applies when the foreign company is a "subsidiary or licensee of the United States trade-mark owner").

[9] This letter stated "the Bureau's opinion that a foreign wholly owned subsidiary and its United States parent corporation are the same corporation within the meaning of * * * the Customs Regulations. This interpretation has been consistently applied for some years before insertion of the 'related companies' provision in the customs regulations and since the 'related companies' provision was deleted from the regulations in 1959." C.A. App. 150.

now expressed in 19 C.F.R. 133.21. See Pet. App. 146a-147a.[10]

Customs' longstanding interpretation has been recognized several times by Congress. In 1977, for example, Congress noted that Section 1526 "has been consistently interpreted by the United States Customs Service * * * as excluding from protection foreign-produced merchandise bearing a genuine trademark created, owned, and registered by a citizen of the United States if the foreign producer has been authorized by the American trademark owner to produce and sell abroad goods bearing the recorded trademark." H.R. Rep. 95-621, 95th Cong., 1st Sess. 27 (1977). At that time Congress made two significant changes in Section 1526 (see Pub. L. No. 95-410, § 211, 92 Stat. 903-904, adding 19 U.S.C. 1526(d) and (e))—but it did not change Section 1526(a) or otherwise act to disapprove Customs' approach.

In these circumstances, petitioner's challenge to 19 C.F.R. 133.21 cannot prevail. Customs' longstanding, consistent interpretation of Section 1526 is of course entitled to substantial deference. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), slip op. 5; *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). Although Congress is aware of Customs' approach and has amended the statute in other respects, it has taken no steps to disapprove Customs' reading

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[10] As the courts below noted (Pet. App. 68a, 72a-75a, 148a-153a), Customs' enforcement practices were not always applied consistently. But this evidently followed not from any stated variation in Customs' policies, but rather from Customs' inability to determine the relationship between the domestic and foreign users of the trademark. See Pet. App. 152a-153a.

of Section 1526. See, *e.g.*, *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). The Court of International Trade found "substantial commercial reliance on Customs' interpretation" (Pet. App. 169a). Compare *Zenith Radio Corp.*, 437 U.S. at 457. And Customs' reading is the only one that does not "defeat the plain purpose of the statute." *Bob Jones University* v. *United States*, 461 U.S. 574, 586 (1983). Despite the breadth of Section 1526's language, then, 19 C.F.R. 133.21 is supportable as a reasonable interpretation of the statute. There accordingly is no reason to review the judgment below upholding the validity of that regulation (albeit upholding it on other grounds).

2. In any event, even if the Court were to conclude that Customs' interpretation of Section 1526 might warrant review, this case presents an unsuitable vehicle. As the court below emphasized, petitioner's suit is a facial challenge to the validity of 19 C.F.R. 133.21 (see Pet. App. 11a). As a result, no specific import transactions are at issue (*ibid.*). The nature of petitioner's distribution system (*id.* at 15a), the source of the grey market goods (*id.* at 14a), and even the character of the goods themselves (*id.* at 12a n.3) are unclear from the record.

The issue presented here, however, is one that can be resolved most effectively only on the basis of a clear record. As the court of appeals itself recognized (Pet. App. 85a), even if Customs' interpretation is rejected, the broad language of Section 1526 undoubtedly contains some implicit exceptions (Pet. App. 85a); because petitioner's challenge was not brought in the context of a particular factual setting, this

case provides no opportunity for the Court to identify those exceptions—or to determine whether petitioner falls within one. Similarly, while the court of appeals' reading of Section 1526 turns in large part on the asserted inconsistency of Customs' approach, the court acknowledged that Customs consistently has barred imports when the foreign and domestic trademark holders were parent and subsidiary corporations (Pet. App. 70a, 75a). Yet that appears to be the relationship between petitioner and the foreign holders of the VIVITAR trademark.

Finally, litigation concerning the validity of Customs' reading of Section 1526 currently is proceeding in other circuits. District courts in two circuits have upheld the validity of 19 C.F.R. 133.21, relying on Customs' interpretation of the statute. *Coalition to Preserve the Integrity of American Trademarks* v. *United States* (*COPIAT*), 598 F. Supp. 844 (D.D.C. 1984), appeal pending, No. 84-5895 (D.C. Cir.); *Olympus Corp.* v. *United States*, No. CV-84-0920 (E.D.N.Y. Aug. 22, 1985), appeal pending, No. 85-6282 (2d Cir.).[11] Appeals from those decisions (which were rendered pursuant to the district courts' authority to decide trademark issues (see 28 U.S.C. 1338)) will, as Judge Davis observed below, go to the regional courts of appeals. See 28 U.S.C. 1295(a)(1). Review by this Court of the issues presented here ac-

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[11] Two other district courts have held that private parties may challenge the importation of grey market goods, although they expressly did not reach the validity of 19 C.F.R. 133.21. *Bell & Howell: Mamiya Co.* v. *Masel Supply Co.*, 548 F. Supp. 1063 (E.D.N.Y. 1982), rev'd on other grounds, 719 F.2d 42 (2d Cir. 1983); *Osawa & Co.* v. *United States*, 589 F. Supp. 1163 (S.D.N.Y. 1984).

cordingly should await consideration by the circuits [12] of the validity of the Customs regulation.[13] See *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977).

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[12] As Judge Davis noted below, the court of appeals' discussion of the availability of private suits against the importation of grey market goods is dictum that the court most likely will not have an opportunity to apply. Furthermore, in contrast to the decision below, the pending appeals in *COPIAT* and *Olympus* present challenges both to Customs' interpretation of Section 1526 and to its reading of Section 42 of the Lanham Act (15 U.S.C. 1124), a provision that 19 C.F.R. 133.21 also is intended to implement. Waiting for a case in which both statutory issues are presented would permit the Court to definitively resolve the validity of 19 C.F.R. 133.21.

[13] Petitioner contends (Pet. 23-26) that the court of appeals failed to apply the principles of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), when, after rejecting Customs' legal arguments, it declined to direct Customs to reconsider its promulgation of 19 C.F.R. 133.21. The contention does not warrant review. The court of appeals articulated no legal principle that conflicts with *Chenery*. And a remand would in any event be futile. Customs adheres to the legal position expressed before the court of appeals; as noted above, the agency has successfully asserted that position in litigation in several district courts. Pending the completion of that litigation, Customs will consider itself bound by its view of the congressional intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20083